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No. 79-1336

In the

Supreme Court of the United States

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, A Corporation,

Petitioner,

vs.

KALO BRICK & TILE COMPANY,

Respondent.

On Certiorari to the Court of Appeals of Iowa

PETITIONER'S REPLY TO RESPONDENT'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

	PAGE
COMMENTS ON RESPONDENT'S STATEMENT OF THE CASE	1
ARGUMENT	4
CONCLUSION	10

CITATIONS

CASES

Asbury v. Chesapeake and Ohio Railway Company, 314 F. Supp. 310 (D.D.C. 1970)	5
Chicago & North Western Ry. Co. v. Union Packing Co., 373 F.Supp. 734 (D. Nb. 1974)	5, 6
Chicago, Rock Island & Pacific Ry. v. Schendel, 270 U.S. 611 (1925)	9
Froehling Supply Co. v. United States, 194 F.2d 637 (7th Cir. 1952)	6
General Foods Corp. v. Baker, 451 F.Supp. 873 (D. Md. 1978)	5
Holt Motor Co. v. Nicholson Universal S.S. Co., 56 F.Supp. 585, (D. Mn. 1944)	5
I.C.C. v. Chicago & North Western Transportation Co., 533 F.2d 1025 (8th Cir. 1976)	7, 9
I.C.C. v. Chicago, Rock Island & Pac. R.R., 501 F.2d 908 (8th Cir. 1974), cert. denied 420 U.S. 972 (1974)	6, 7
I.C.C. v. Maine Central Railroad, 505 F.2d 590 (2nd Cir. 1975)	6, 7
Johnson v. Chicago, M. and St. P. R.R., 400 F.2d 968 (9th Cir. 1968)	7

PAGE

Missouri Pacific R.R. Co. v. Stroud 267 U.S. 404 (1925) 8

New York Central Railroad Company v. United States, 201 F.Supp. 958 (S.D. N.Y. 1962) 7

Powell v. United States, 300 U.S. 276 (1937) 7

Transit Commission v. United States, 289 U.S. 121 (1932) 8

CONSTITUTIONAL PROVISIONS AND STATUTES

46 U.S.C. §843, et seq. 5

Interstate Commerce Act:

(Title 49 U.S.C. was revised by Public Law 95-473, October 17, 1978, without substantive change. (49 U.S.C. §§10101, et seq.) Since all cases cited in this brief refer only to the pre-revision section headings, the argument in this brief also refers to those section headings. The pre-revision sections are correlated here with the sections of the new revised Act.)

Pre-revision Act	Revised Act
49 U.S.C. §1(20)	§§11702 and 11704
49 U.S.C. §9	§11705
49 U.S.C. §20(11) (proviso)	§10103
49 U.S.C. §20(11)	§§11707 and 10730

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COMMENTS ON RESPONDENT'S STATEMENT OF THE CASE

Kalo did actively participate in the abandonment proceedings before the Commission. In response to the Transportation Company's application for permission to abandon the Kalo branch line, Kalo filed "Objections to Abandonment" and a "Protest to Proposed Abandonment". (Rec., Def. Ex. YYY, Tr. p. 390-394).[1] The Com-

[1] "Rec." refers to items contained the record filed with the Clerk of the Supreme Court of the United States but not included in the Appendix to Petition for Writ of Certiorari or in the Joint Appendix.

mission ruled that Kalo had defaulted because it had not filed a verified statement in opposition as required. (I.C.C. Order entered April 30, 1976, Appendix p. 35a).[2] Kalo later filed an "Application for Re-hearing and Motion To Set Aside Order", verified by Kalo's counsel. (Rec., Def. Ex. YYY, Tr. p. 390-394).

The Commission then entered an order denying Kalo's Application for Rehearing saying that the Application "sets forth no material facts or arguments in addition to those previously considered in the proceeding; and that no showing has been made warranting reconsideration of said order. . ." (I.C.C. Order entered Sept. 23, 1976, Appendix p. 41a). This Order of the Commission was not appealed. Judgment in the present case was not entered in Webster County Iowa District Court until July 29, 1977.

Ponded water near the Shady Oak Transfer caused a portion of the roadbed to wash out. However, the line became impassable because of slides. The slides were caused by soil composition that made the slopes unstable.

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[2] Pursuant to Rule 30 of the Rules of the Supreme Court for the United States, items already reproduced in the appendix filed as part of the Petition for Certiorari have not been reproduced in the Joint Appendix. Matters contained in the appendix to the petition for certiorari are cited in this brief as: (Appendix p. 1a.) Matters contained in the Joint Appendix are cited in this brief as: (Joint App. p. 77). The appendix contains pages 1a-76a. The Joint Appendix commences with page 77.

The slides causing the cessation of service were not caused by improper maintenance procedures.[3]

The trial court judge found that earth slides occurred on the Kalo branch line during the first days of April, 1973, that on April 4, 1973, the Transportation Company notified Kalo it could not provide cars, and that on April 18, 1973, Kalo had already notified its customers it was going out of business. (Trial Court Opinion, Appendix p. 15a). Between April 4, 1973, and April 25, 1973, the Transportation Company decided it could not maintain safe rail passage over the line, but the trial court judge found the Transportation Company had not at that time decided to attempt to abandon the line (Trial Court Opinion, Appendix, p. 16a). Thus, Kalo decided to go out of business *before* any attempt to abandon the line.[4]

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[3] The trial court's findings stated:

> "The washout at the northern junction of the Shady Oak Transfer was comparatively simple for the Defendant Railroad to repair. The reason this line was removed from service was because of the slides which were taking place along many points of the line and the above washout of the railroad embankment was a single factor in the decision to terminate service over the line. There has been a long history of slides on the Fort Dodge, Des Moines & Southern Railway because of the composition of the soil. The slopes are unstable and several of the slopes are moving. The tracks are built on an unstable area." (Trial Court Opinion, Appendix p. 16a).

[4] The Trial Courts findings thus show that Kalo's alleged damages for destruction of its business could not have been caused by unlawful abandonment because the Transportation Company had no intent to abandon on April 18, 1973, when Kalo notified its customers it was going out of business.

ARGUMENT

THE INTERSTATE COMMERCE ACT HAS PREEMPTED THE POWER OF COURTS OVER RAIL CARRIERS IN INTERSTATE COMMERCE IN MATTERS OF RAILROAD LINE ABANDONMENT AND PROVISION OF CAR SERVICE OVER THOSE LINES.

Kalo's brief on the merits does not succeed in diminishing the importance of the major fact in this case: Kalo utilized the branch line in question entirely for shipment in interstate commerce. Kalo does admit that the issue of whether the cessation of rail service occurred because of conditions beyond the Transportation Company's control is central and common both to Kalo's state court negligence claims and to the Transportation Company's contention that it instituted a lawful embargo of interstate service and that abandonment of the line was lawful. (Br. of Respondent, p. 5.) The Commission ruled that cessation of service occurred because of conditions beyond the Transportation's Company control. (I.C.C. order entered April 30, 1976, Appendix, p. 35a). A state court should not be allowed to make an opposite ruling on the same causation issue and use that opposite ruling as the foundation for an award of damages against the Transportation Company. Such a result would undermine the uniformity sought by the Interstate Commerce Act.

The Transportation Company is an interstate common carrier suject to Chapter 1 of the Interstate Commerce Act, and therefore any person claiming to be damaged by the Transportation Company's violation of Chapter 1 of the Act must elect to bring its claim either before the

Commission or in federal district court. 49 U.S.C. §9 (1970 Ed.).[5] Determination of the validity of an embargo of interstate rail service is simply a determination of whether the carrier has breached its duty under the Interstate Commerce Act to provide interstate rail service. *Asbury* v. *Chesapeake and Ohio Railway Company,* 314 F. Supp. 310, 312-313 (D.D.C. 1970); *General Foods Corp.* v. *Baker,* 451 F.Supp. 873, 875-876 (D. Md. 1978).

The validity or reasonableness of embargoes is usually left to a determination by the Commission. *Asbury* v. *Chesapeake and Ohio Railway Company, supra,* at 313; *New York Central Railroad Company* v. *United States,* 201 F. Supp. 958, 959 (S.D. N.Y. 1962); *Chicago & North Western Ry. Co.* v. *Union Packing Co.,* 373 F. Supp. 734, 737 (D. Nb. 1974); *See, Holt Motor Co.* v. *Nicholson Universal S.S. Co.,* 56 F.Supp. 585, 591-592 (D. Mn. 1944) (decided under the Intercoastal Shipping Act of 1938, as amended 1938, 46 U.S.C. §§843, et seq.). If a shipper seeks relief because of an allegedly invalid or unlawful embargo of interstate rail service, and the shipper for some reason chooses not to initiate its claim before the Commission, the only possible forum remaining to the shipper is federal district court. *General Foods Corp.* v. *Baker,* 451 F.Supp. 873, 876 (D. Md. 1978); 49 U.S.C. §9 (1970 Ed.).

An embargo "is not promulgated for the protection of the shipper or the consignee but to protect transporta-

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[5] Title 49, U.S.C. was revised by Public Law 95-473, October 17, 1978. 49 U.S.C. § 10101, et. seq. The section headings of the new revised Act are correlated with the section headings of the pre-revision Act in the table of citations, supra. In the body of the argument, citations will be to the pre-revision Act, since all cases cited refer to the pre-revision sections.

For these reasons, and others set forth above in this brief and in petitioner's initial brief on the merits, petitioner respectfully prays that this Court enter judgment taxing costs to Kalo, reversing the judgment of the Iowa Court of Appeals, and ordering the Iowa Court of Appeals to reinstate the judgment of the Iowa District Court of Webster County, Iowa, dismissing with prejudice:

1) Kalo's original petition;

2) Kalo's Division II of its petition, as amended;

3) and Kalo's Division III of its petition, as amended.

Respectfully submitted,

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